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Docket Management Facility
[USCG-2001-8773]
Department of Transportation
400 Seventh Street, SW
Washington, DC 20590-0001

Re: Marine Casualties and Investigations; Chemical Testing Following Serious Marine Incidents

To Whom It May Concern:

The International Association of Drilling Contractors is a trade association representing the interests of the owners and operators of oil, gas, and geothermal well drilling equipment worldwide. Our membership includes all companies currently operating mobile offshore drilling units (MODUs) under U.S. flag, all companies operating MODUs in areas subject to the jurisdiction of the United States, and all companies operating MODUs competitively, worldwide.

We offer the following comments in response to the 28 February 2003 (68 FR 9622) notice of proposed rulemaking.

1. *Testing of human remains.* In apparent response to a comment filed in a separate rulemaking by the IADC, the preamble to the proposed rule (68 FR 9623) states: "the comment requested we remove the requirement to conduct alcohol or drug testing on human remains" but fails to identify the context in which this request was made. IADC had submitted comments to the Department of Transportation's (DOT's) rulemaking docket identifying the problems in complying with their regulations with respect to testing of human remains and recommending that consideration be given to developing a separate subpart describing the procedures to be used for collection and testing of specimens from human remains. DOT did not revise their regulations. It remains our view that it is infeasible to comply with the DOT's prescriptive requirements while performing the mandated tests on human remains. Further, despite the Coast Guard's assurances, absent clarification from DOT regarding the relationship between the DOT regulations and those of the Coast Guard, we believe that the DOT's regulations must be given primacy.

2. *Addition of a waiver for supervisor-involvement in testing in accordance with of 49 CFR 40.31(c).* The preamble to the proposed rule states that: "The provisions of 49 CFR part 40, the DOT's drug testing requirements, apply to Coast Guard required drug testing." 49 CFR 40.31(c) states:

> (c) As the immediate supervisor of an employee being tested, you may not act as the collector when that employee is tested, unless no other collector is available and you are permitted to do so under DOT agency drug and alcohol regulations.

As demonstrated by the requirements of the proposed §4.06-15, the Coast Guard anticipates that there are likely to be circumstances where collection and/or testing will necessarily be undertaken on-board the vessel under the supervision of ships' personnel. Absent authorizing Coast Guard regulations, it would not appear possible for a vessel's master to act as the collector for a watch officer under such circumstances without violating the DOT regulations.

The Coast Guard should add language to its regulations to permit an immediate supervisor to act as the collector when no other collector is available.

3. *Good faith determination as to whether the occurrence currently is, or is likely to become, a serious marine incident.* Under §4.06-1(1) the requirements for conducting post-incident testing are predicated the marine employer's good faith determination as to whether the occurrence currently is, or is likely to become, a serious marine incident. However, the language used in subsequent requirements (*e.g.*, the proposed §4.06-3(b)) is confusing because it refers only to a serious marine incident (SMI) and not to "an incident that the marine employer has determined is, or is likely to become, a serious marine incident."

Where the regulations rely on the marine employer's determination that an incident is likely to become a "serious marine incident" the language of the rule should be changed to clearly indicate that the provision is made applicable by the marine employer's determination at that time and not by any subsequent classification (or lack thereof) of the incident as a "serious marine incident".

4. *Marine Employer responsibility regarding indoctrination of third-party personnel.* While it is not a new requirement, we request clarification of the responsibility of the "Marine Employer" with respect to the indoctrination of third-party personnel. As the Coast Guard is aware, on MODUs engaged in OCS activities, under the provisions of 43U.S.C. 1348, the holder or the lease or permit is given broad responsibilities for health, safety and the protection of the environment. Lessees and permittees contract for the services of a MODU and may independently contract for other service providers to conduct operations from the MODU. The lessee or permittee may also assign supervisory personnel to the MODU. The nature of these services is such that it is likely that the third-party personnel conducting such operations could become "directly involved in a serious marine incident." We request confirmation that lessee or permittee supervisory personnel and third-party contractor personnel, when working on board a MODU, may be subject to the post incident testing requirements of 46 CFR subpart 4.06 and therefore should be indoctrinated in accordance with §4.06-1(e).

5. *Alcohol testing by Coast Guard or local law enforcement personnel.* The proposed §4.06-3 is meaningless. Given that these are Coast Guard regulations, and the Coast Guard conducts alcohol testing of its own volition, the marine employer should be able to presume that any testing undertaken by the Coast Guard fully satisfies the requirements of 46 CFR part 4 with respect to that incident. The marine employer is not in the position to make the necessary assurances regarding the conduct of testing undertaken by Coast Guard or other law enforcement personnel – particularly if the requirements of the DOT's regulations in 49 CFR part 40 are applicable and must be satisfied.

We suggest that §4.06-3(a)(4) be revised to read as follows:

"(4) The marine employer may presume that if any alcohol-testing is conducted by the Coast Guard it fully satisfies the alcohol-testing requirements of this part with respect to that incident."

If this suggestion is not accepted, we recommend that §4.06-3(a)(4) be deleted.

6. Requirements for collection and shipping kits in the proposed §4.06-3(b)(2). It appears that the proposed §4.06-3(b)(2) would be better placed in the proposed §4.06-20 as a general requirement that any drug testing be conducted in accordance with 49 CFR part 40.

7. Blood tests. If the provisions of 49 CFR part 40 are applicable to Coast Guard alcohol testing, then the provisions regarding blood tests need not be included as such testing is prohibited by 49 CFR 40.277. 49 CFR part 40 already covers the procedures for blood tests for drug use. Amplifying Coast Guard regulations in this respect would not appear necessary if, as indicated in the preamble, the Coast Guard drug testing program is covered by 49 CFR part 40.

8. *Notice on implications for failure to test.* Once again, we would urge the Coast Guard to amend §4.06-5 to provide additional notice regarding additional consequences, beyond a potential civil penalty, for failing to submit to testing.

We suggest that the following text be added at the end of §4.06-5(c);

" . . . and may be reported to potential future employers in accordance with 49 CFR 40.25."

9. *Extension of testing device carriage requirements to foreign-flag vessels.* By using the term "inspected vessels, the existing 46 CFR 4.06.20 seems to limit the requirement for carriage of breath testing devices on U.S. flag vessels. The proposed §4.06-15 (a) is not limited to U.S. flag vessels. From the discussion in the preamble regarding the proposed §4.06-15, it appears that carriage of testing devices will be required of <u>any</u> commercial vessel, irrespective of flag, where it is likely that such a device cannot be delivered to the vessel for use within 2 hours of an incident that could become a "serious marine incident." In the regulatory evaluation, the Coast Guard does not appear to have considered that the rule may require testing devices to be carried by foreign-flag vessels. However, chapter 23 of title 46 of the U.S. Code is generally understood to be applicable to foreign vessels operating in the territorial sea. (Comment 14 also addresses the general applicability of 46 U.S.C. 2303a.)

We request clarification of the applicability of the proposed §4.06-15 to foreign flag vessels.

We suggest that the language of §4.06-15(a) be revised to parallel that provided in the proposed §4.06-15(b) by adding the following sentence:

"The alcohol testing device need not be carried aboard each vessel if obtaining such a device and conducting the required alcohol test can be completed within 2 hours from the time of the occurrence of the SMI."

10. *Definition of "navigable waters of the United States."* The requirement to perform testing is dependent upon whether or not the incident occurs in the "navigable waters of the United States" in accordance with 46 CFR 4.03.1 and 4.03.2. The term is not defined in 46 CFR, but is defined in 46 U.S.C. 2101(17a). On 14 August 2002, the Coast Guard issued a proposed rule (67 FR 52906) to

update and clarify its regulatory definitions to reflect statutory changes and Presidential proclamations affecting Coast Guard jurisdiction in title 33 of the Code of Federal Regulations. As part of this rulemaking, the Coast Guard proposed two definitions of "navigable waters of the United States, the first (proposed §2.36(a)) for purposes of and 312 of the Federal Water Pollution Control Act (FWPCA) and the Oil Pollution Act of 1990, and the second (proposed §2.36(b)) for all other purposes. The authority citation for 46 CFR part 4, refers to titles 33, 43 and 46 of the United States Code. In view of the provisions of 46 CFR 4.03-2(b) and (c) referring to matters related to the FWPCA, we presume that the intent is that the definition in the proposed 33 CFR 2.36(a) is to apply to 46 CFR part 4, rather than the definition in 46 U.S.C. 2101(17a).

We suggest that clarification of the term "navigable waters of the United States" be provided in the text of part 4 by reference to the relevant definition in 33 CFR part 2.

We note that the authority citation for 46 CFR part 4, includes 43 U.S.C. 1333. The importance of making the above distinction is the inclusion, in the existing 33 CFR 2.05-25(b)(2) of "Other waters over which the Federal Government may exercise Constitutional Authority," and in the proposed 33 CFR 2.36(a) of "Waters subject to the jurisdiction of the United States, as defined in § 2.38." These terms may be interpreted as extending the applicability of the regulations to certain locations that lie outside the 12-nautical mile territorial sea but which, because they are subject to U.S. jurisdiction, may be considered as locations over which "the Federal Government may exercise Constitutional Authority," or "Waters subject to the jurisdiction of the United States." 43 U.S.C. 1332, with respect to facilities on the Outer Continental Shelf (OCS), and 43 U.S.C. 1518, with respect to Deepwater Ports, extend the jurisdiction of the United States to places beyond the limits of the territorial sea. For example, a Panamanian-flag mobile offshore drilling unit attached to the seabed of the OCS beyond the limits of the territorial sea may suffer a well control incident resulting in the discharge of more than 10,000 gallons of oil. Given the ambiguity of the current and proposed regulations, it is possible to argue that this would be a "serious marine incident" under 46 CFR 4.03-2, even though it did not involve a United States' vessel, was located beyond the limits of the territorial sea, and was not a "transportation" incident.

We request confirmation that the Coast Guard does not intend the provisions of 46 CFR subpart 4.06 to apply to incidents involving a vessel that is not a United States' vessel that occurs during activities subject to the OCS Lands Act in a location beyond the limits of the territorial sea?

11. *Penalties.* If reference to penalties is to be included in the regulations, we believe that it is appropriate to emphasize that the civil penalty provision of 46 U.S.C. 2115 may be applied to an individual, irrespective of his or her relationship to the "marine employer" who refuses to submit to a required test.

We recommend that the provisions of 46 U.S.C. 2115 be paraphrased in §4.06-70. For example:

"Any person who fails to implement or conduct, or who otherwise fails to comply with the requirements of this part is subject to the civil penalties set forth in 46 U.S.C. 2115."

12. *Conflict with DOT regulations.* As noted in our letter of 28 April 2003 to the Office of Management and Budget, and copied to this docket, we believe that the Coast Guard and the DOT must work

together to clearly and unambiguously state the individual and joint applicability of their drug and alcohol testing regulations.

13. *Clarification of "exclusion" in §4.01-3*. It is not clear if the "reporting" exclusions provided in §4.01-3 extend to drug and alcohol testing under subpart 4.06. The language in §4.01-3 should be reviewed and, if necessary, revised.

14. *Implementation of 46 USC 2303a.* The preamble to the NPRM indicates that this proposal is intended to be responsive to the mandate of 46 USC 2303a requiring the Coast Guard to "establish procedure ensuring alcohol testing is conducted within two hours of a serious marine casualty. In this proposal, the Coast Guard has assumed that "serious marine casualty" as used in the statute is synonymous with "serious marine incident" as defined in its regulations. However, this assumption with respect to the definition limits the Coast Guard's implementation of the provisions of 46 USC 2303a to commercial vessels, and the scope is further limited by exclusions in §4.01-3. We do not read 46 USC 2303a as being limited in scope to commercial vessels and note that it applies to "crew members *or other persons responsible for the operation* . . . of the vessel or vessels involved . . .". The Coast Guard should confirm that the scope of applicability provided by the placement of these requirements in 46 CFR subpart 4.06 conforms to the scope intended by 46 USC 2303a and the general applicability of chapter 23 of title 46 of the U.S. Code and, if necessary, propose regulations with a broader scope of application.

If you have any questions about these comments, please feel free to contact me by phone at (281) 578-7171, ext. 207 or, after 20 July 2003 at (713) 292 1945).

Sincerely,

Alan Spackman
Director, Offshore Technical
and Regulatory Affairs

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